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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR ALFONSO REYES, Defendant and Appellant.	H045457 (San Benito County Super. Ct. No. CR1701443)

Defendant Victor Alfonso Reyes was convicted after a jury trial in December 2017 of second-degree commercial burglary (Pen. Code, § 459)[1] and receiving stolen property (§ 496, subd. (a)). The court sentenced defendant to the upper term of three years. After awarding defendant 568 days of custody credits and suspending execution of the remaining 527 days, it placed defendant on mandatory supervision (§ 1170, subd. (h)(5)(B)).

Defendant raises two challenges on appeal.[2] First, he contends that the court abused its discretion in imposing a condition as part of his mandatory supervision that he

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] In his opening brief, defendant asserted a third challenge, namely, that a mandatory condition requiring his payment of $30 per month for supervision costs was unauthorized under section 1203.1b and should be stricken. In the reply brief, appellant's counsel acknowledged that her position was in error, and she withdrew the appellate claim.

not possess or consume alcohol or be present or frequent locations where alcohol is present. Second, he argues that the no-alcohol condition is unconstitutionally vague and overly broad.

We conclude that the trial court did not abuse its discretion in imposing the no-alcohol condition. But we hold that the condition is overly broad and therefore unconstitutional on its face. We will order the condition modified. As modified, we affirm the judgment.

I. FACTUAL BACKGROUND

Paul DaSilva, information technology (IT) manager for the City of Hollister, arrived for work at Hollister City Hall at approximately 6:00 a.m. on April 10, 2017. He noticed that things on his desk were in disarray and that a window screen was underneath his desk; the screen was missing from the window located next to DaSilva's desk and next to an alley on the side of the building. He also became aware that several new computer tablets, his overnight bag, and other items that had been on shelves were missing. DaSilva called the police to report the break-in.

Hollister Police Officer Don Tong responded to a call of a possible break-in and met DaSilva at Hollister City Hall shortly after 6:00 a.m. on April 10, 2017. Officer Tong observed a window screen that was leaning against DaSilva's desk. There was a window in DaSilva's office that was ajar, had a broken latch, and a missing screen; an alley walkway was next to the window leading to a back parking lot.[3] There was a room adjacent to DaSilva's office that contained computer equipment; DaSilva advised Officer Tong that some of the equipment was missing. At the time, DaSilva provided to Officer Tong a list containing the serial numbers, makes, and model numbers of the missing laptops and tablets. As the day progressed, DaSilva noticed that there were other items

[3] DaSilva testified that, although he had thought at the time that the window latch was broken during the break-in, he later discovered that the latch had been broken sometime beforehand.

missing, including a flat screen television, approximately five boxes of new software, an all-in-one computer (computer with monitor), and cords for laptop computers. DaSilva estimated that the replacement cost of the missing items was $20,000.

DaSilva showed Officer Tong surveillance video covering a period of several hours before 6:00 a.m. on April 10. The coverage for the surveillance cameras at City Hall included the side of the building, an alleyway, and the back parking lot. On the surveillance video, Officer Tong observed a person wearing black clothing (including a black hooded sweater) walk toward the building, taking electronic equipment from the IT building to a portion of the back parking lot. From a videotape image captured at 1:38 a.m., Officer Tong was able to identify defendant located in the alley. Officer Tong recognized defendant based upon his prior contacts with him on a number of occasions in Officer Tong's capacity as a police officer. From the surveillance video, he determined that defendant returned to the rear area of the IT building at 4:33 a.m. with a shopping cart that had a television monitor and laptop computers in it.

At approximately 7:30 the same morning, Officer Tong and fellow officers went to defendant's Hollister residence. Officer Tong observed defendant sleeping on a couch on the front porch. Officer Tong called to defendant to wake up, and he asked him to get off the couch. Defendant seemed to Officer Tong to be extremely tired and incoherent. On the couch next to defendant was a bag that Officer Tong had observed in the surveillance footage. There were multiple electronics cords for laptops and tablets underneath defendant. The bag contained a laptop/tablet computer. There was a "City of Hollister" sticker on the tablet and the serial number matched information DaSilva had previously given Officer Tong concerning missing tablets.

II. PROCEDURAL BACKGROUND

On October 16, 2017, defendant was charged by a two-count information with second-degree commercial burglary, a felony (§ 459; count one), and receiving stolen property, a misdemeanor (§ 496, subd. (a); count two). On December 12, 2017,

defendant was convicted after a jury trial of both charged offenses. The court sentenced defendant on January 18, 2018, to the upper term of three years on count one, and it imposed a one-year concurrent sentence on count two. The court awarded defendant 568 days of custody credits, suspended execution of the remaining 527 days, and placed defendant on mandatory supervision pursuant to section 1170, subdivision (h)(5)(B). As a condition of mandatory supervision, the court ordered: "Abstain from the use or possession of controlled substances without a valid prescription and from alcoholic beverages and do not be present or frequent any location where those substances are present, available or being used." The abstract of judgment was filed on January 24, 2019.

Defendant filed a timely notice of appeal.[4]

III. DISCUSSION

A. Supervised Release/Probation Conditions Generally

It has been held that, although the trial court is authorized under section 1170, subdivision (h)(5)(B)(i) "to suspend execution of a concluding portion of a defendant's term, 'during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation,' . . . this does not mean placing a defendant on mandatory supervision is the equivalent of granting probation or giving a conditional sentence. Indeed, section 1170, subdivision (h), comes into play only after probation has been denied. [Citation.] . . . Thus, the Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422

[4] Although the notice of appeal was filed prematurely (i.e., before judgment was entered), we exercise our discretion to "treat the notice as filed immediately after the rendition of judgment." (Cal. Rules of Court, rule 8.308(c); see *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994, fn. 1.)

(*Fandinola*).) Relying on *Fandinola*, one court has concluded that because " 'mandatory supervision is more similar to parole than probation.' [Citation.] . . . [T]he validity of the terms of supervised release [is appropriately analyzed] under standards analogous to the conditions or parallel to those applied to terms of parole." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 763.) And in analyzing the validity and reasonableness of parole conditions, courts apply "the same standard as that developed for probation conditions." (*Id.* at p. 764.)

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121 (*Carbajal*).) We thus review the trial court's imposition of each probation condition for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Although the trial court's discretion is broad, it is not unlimited; a probation condition must serve a purpose specified in the statute. (*Carbajal, supra,* at p. 1121.)

In order for a probation condition to be determined invalid—and thus, for it to be concluded that the trial court abused its discretion in the imposition of the condition—the appellant must satisfy the three-part *Lent* test enunciated by our high court, namely, the probation condition must " '(1) [have] no relationship to the crime of which the offender was convicted, (2) relate[] to conduct which is not in itself criminal, and (3) require[] or forbid[] conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted (*Lent*), superseded by statute on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-295.) Each of these three elements must be met to invalidate the probation condition. (*Lent, supra,* at p. 486, fn. 1.)

Adult offenders and juveniles may challenge a probation condition on the grounds that it is unconstitutionally vague or overly broad. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887.) As a panel of this court has explained: "Although the two objections

are often mentioned in the same breath, they are conceptually quite distinct. A restriction is unconstitutionally vague if it is not ' "sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' [Citation.] A restriction failing this test does not give adequate notice—'fair warning'—of the conduct proscribed. [Citations.] A restriction is unconstitutionally overbroad, on the other hand, if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

B. No-Alcohol Condition

1. Procedural Background

At sentencing, the court imposed as a condition for mandatory supervision that defendant refrain from possessing or using controlled substances or alcohol. As recited by the court, that condition read: "Abstain from the use or possession of controlled substances without a valid prescription and from alcoholic beverages and do not be present or frequent any location where those substances are present, available or being used." Defense counsel objected at the hearing to the condition insofar as it prohibited defendant's consumption of alcohol. She argued that the crime of which defendant was convicted was not alcohol-related and there was nothing in defendant's criminal history that suggested an alcohol issue. The court overruled the objection.

Defendant challenges the mandatory supervision condition insofar as it prohibits his possession or use of alcohol or his going to or frequenting locations where alcohol is

present.[5] He argues that the no-alcohol condition is unconstitutionally vague and overly broad to the extent it prohibits him "from being present at 'any location' where alcohol is 'present, available, or being used.' " He contends further that the court abused its discretion by imposing the no-alcohol condition.

The Attorney General responds that defendant forfeited his challenge that the no-alcohol condition is vague and overly broad, and that the condition is in any event constitutional. The Attorney General responds further that the court did not abuse its discretion in imposing the no-alcohol condition.

2. Reasonableness Challenge to No-Alcohol Condition

Defendant, in arguing that the no-alcohol condition was unreasonable and therefore the court abused its discretion, contends that each of the three *Lent* factors are satisfied here. The Attorney General responds that the no-alcohol condition was properly imposed. He asserts there is some evidence defendant was under the influence when he committed the offense and that the trial court properly concluded that abstinence from alcohol was reasonably related to preventing future criminality.

As to the first *Lent* element, it is apparent that alcohol consumption bore no relationship to the commercial burglary and receiving stolen property crimes of which defendant was convicted. (*Lent, supra*, 15 Cal.3d at p. 486.) The Attorney General, however, argues to the contrary, contending the record shows that defendant "was under the influence when he committed his current offense." The Attorney General argues that the record showed that when Officer Tong and other officers appeared at approximately 7:30 a.m., defendant "was passed out on the porch of the residence," and Officer Tong

[5] Defendant does not challenge the imposition of the condition, including its wording or its breadth, as to its proscription of the possession of or use of controlled substances without a valid prescription.

needed "to call [defendant's] name and shake [him] in order to wake him up."[6] And the Attorney General notes that Officer Tong testified that it appeared to him that defendant was extremely tired and incoherent.[7] We disagree with the Attorney General that the record shows that there was a relationship between alcohol consumption and the crimes here. There is no evidence defendant was under the influence of alcohol (or drugs, for that matter) at the time he committed the burglary at Hollister City Hall. And there was no evidence that defendant had consumed alcohol, or that this was the reason that he needed to be awakened when the police arrived at his home at 7:30 the morning after the burglary.

The second *Lent* element, as the Attorney General acknowledges, was satisfied because possession and consumption of alcohol by a person of defendant's age are legal activities. (*Lent*, *supra*, 15 Cal.3d at p. 486.)

Thus, the third *Lent* factor—whether the challenged condition "forbids conduct which is not reasonably related to future criminality" (*Lent*, *supra*, 15 Cal.3d at p. 486)—is critical to determining the reasonableness of the condition here. Whether the imposition of an alcohol-use condition constitutes an abuse of discretion "is determined by the particular facts of each case." (*People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644 (*Lindsay*).)

In support of his challenge to the no-alcohol condition, defendant relies on *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*), disapproved on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 236-237 (*Welch*). In *Kiddoo*, the defendant, after

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[6] Officer Tong testified that he called defendant's name to wake up defendant, who thereafter awakened within "[a] few seconds." The record does not clearly indicate that Officer Tong testified he needed to, or did, shake defendant to awaken him.

[7] The Attorney General also cites to testimony by Officer Tong—objected to by defense counsel and stricken by the trial court—that it appeared that defendant was "coming down from a meth binge." Because this testimony was stricken, we do not consider it here.

being convicted of methamphetamine possession, was granted probation that included a condition that he not possess or consume alcohol or frequent businesses where alcohol was the primary item of sale. (*Kiddoo*, *supra*, at p. 924.) Kiddoo told his probation officer that (1) he had sold drugs to support a gambling habit, (2) "he had used marijuana, methamphetamine, amphetamine, cocaine and alcohol since he was 14, (3) he had 'no prior problem,' (4) he was a social drinker, and (5) used methamphetamine sporadically." (*Id.* at p. 927.) The appellate court struck the no-alcohol condition, concluding the crime was not alcohol-related, alcohol possession and use were not proscribed criminally, and there was no indication the probation condition was reasonably related to future criminal behavior. (*Id.* at pp. 927-928.)

Kiddoo has been subsequently criticized for failing to give proper deference to the trial court's broad discretion in imposing probation conditions. (See *People v. Balestra* (1999) 76 Cal.App.4th 57, 68 (*Balestra*); *People v. Beal* (1997) 60 Cal.App.4th 84, 86 (*Beal*).) In *Beal*—a case relied on by the Attorney General—the defendant pleaded guilty to possession of, and possession for sale of, methamphetamine. (*Beal*, *supra*, at p. 85.) The defendant challenged the imposition of a no-alcohol probation condition, relying on *Kiddoo* to support her argument that the condition was not reasonably related to her crimes or to future criminality. (*Beal*, *supra*, at p. 86.) Although the defendant "characterized herself as a social drinker," she admitted that she had used methamphetamine, marijuana, cocaine, and LSD; said she had sold drugs to support her drug habit; and said "she suffered from 'chemical dependency.' " (*Id.* at pp. 86-87, fn. 1.) Criticizing the *Kiddoo* decision, the *Beal* court upheld the no-alcohol condition, finding that substance abuse was reasonably related to the defendant's crimes, and that alcohol use could lead to future criminality. (*Beal*, *supra*, at p. 87.) The *Beal* court stated: "[W]e disagree with the fundamental assumptions in *Kiddoo* that alcohol and drug abuse are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse. [Citation.] [¶] Rather,

empirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. [Citations.] Presumably for this very reason, the vast majority of drug treatment programs . . . require abstinence from alcohol use. [Citation.]" (*Ibid.*)

Similarly, the court in *Balestra* rejected the defendant's challenge to an alcohol and drug testing probation condition. (*Balestra, supra*, 76 Cal.App.4th at p. 69.) The defendant had been convicted of elder abuse as a result of an incident in which she—while smelling of alcohol—had falsely imprisoned and repeatedly assaulted and threatened her mother for two continuous hours. (*Id.* at p. 61.) The defendant challenged the drug and alcohol testing condition on appeal. (*Id.* at p. 68.) Without referring to the *Lent* criteria, the court followed *Beal, supra,* 60 Cal.App.4th 84, and upheld the condition. (*Balestra, supra,* at pp. 68-69.) The *Balestra* court disapproved of *Kiddoo* as "inconsistent with a proper deference to a trial court's broad discretion in imposing terms of probation." (*Balestra, supra*, at p. 69; see also *Lindsay*, *supra*, 10 Cal.App.4th at p. 1645 [upholding alcohol probation condition where defendant was convicted of sale of cocaine, drug sales were used to support his drug use, and probation report indicated he had " 'been battling an alcohol problem for the past five years' "].)

And in *People v. Smith* (1983) 145 Cal.App.3d 1032, 1033, a case also relied on by the Attorney General, the defendant was convicted of possessing PCP and was under its influence at the time of his arrest. He challenged the no-alcohol condition on the ground that it bore no relationship to the crime of which he was convicted or to future criminality. (*Ibid.*) The appellate court rejected the challenge, observing that when someone uses alcohol, "[s]ensorial impairment is present, there is a lessening of internalized self-control, and euphoria, accompanied by a reduction of anxiety, is experienced. Alcoholic euphoria is accompanied by activity and aggressive behavior . . . . Drinking . . . , even for the social, controlled drinker . . . , can lead to a

temporary relaxation of judgment, discretion, and control. . . . [T]he physical effects of alcohol are not conducive to controlled behavior. [¶] . . . Given the nexus between drug use and alcohol consumption, we find no abuse of discretion in the imposition of the condition of probation relating to alcohol usage." (*Id.* at pp. 1034-1035, fns. omitted.)

In this instance, although there was no relationship between alcohol and the crimes of which defendant was convicted, the record shows that defendant had a substantial criminal history involving drugs. As reflected in the presentence report of the probation officer, between 2005 and 2016, defendant suffered over 30 drug-related convictions, many being for possession of drug paraphernalia (Health & Saf. Code, § 11364) or for using or being under the influence of a controlled substance (*Id.*, § 11550, subd. (a)). The most recent convictions—sentencing for which having occurred in November 2016 (four months prior to commission of the current crimes) and for which defendant received three-years' probation and 365 days in jail—involved one charged offense under Health & Safety Code section 11364 and four charged offenses under Health & Safety Code section 11550, subdivision (a). Although there was no admission by defendant that the current crimes were drug-related, it is reasonable to infer, based upon defendant's extensive criminal history involving drugs, that the current crimes of commercial burglary and receiving stolen property were committed directly or indirectly to facilitate his illegal drug use.

Kiddoo, *supra*, 225 Cal.App.3d 922 is distinguishable in that there, the record did not show that the defendant had a substantial or prolonged problem with drug abuse. Rather, although he was convicted for possession of methamphetamine and admitted to its occasional use, the defendant stated that he possessed and sold drugs to furnish his gambling habit. (*Id.* at p. 927.) Moreover, we agree with the courts in *Beal*, *supra*, 60 Cal.App.4th 84 and *Balestra*, *supra*, 76 Cal.App.4th 57 in their criticism that the *Kiddoo* court failed to adequately consider the broad discretion afforded to the trial court in imposing probation conditions, and in their disagreement "with the fundamental

assumptions in *Kiddoo* that alcohol and drug abuse are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse." (*Beal*, *supra*, at p. 87.) Here, the trial court, in light of defendant's extensive criminal history involving illegal drugs, acted within its discretion in imposing a no-alcohol condition as part of mandatory supervision.

3. Vagueness and Overbreadth Challenges

In addressing defendant's constitutional challenge to the no-alcohol condition on the grounds of vagueness and overbreadth, we first consider the Attorney General's contention that the claim has been forfeited. It is true that as a general matter, the defendant's failure to object to a probation condition at the trial level forfeits any appellate challenge. (*Welch*, *supra*, 5 Cal.4th at p. 237.) But the California Supreme Court has held that where there is a constitutional challenge that the probation condition is overly broad or vague on its face and the matter is purely a question of law, the forfeiture rule does not apply. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887.) Here, although defendant, as he admits, did not object below to the no-alcohol condition on constitutional grounds, the issue is purely a question of law; we will not deem the matter forfeited. (See *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1127.)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Where the condition limits constitutional rights, it must be "closely tailor[ed] . . . to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Ibid.*) Thus, courts may require that vague or overly broad terms in probation conditions be modified or narrowed to satisfy constitutional standards. (See, e.g., *People v. Leon* (2010) 181 Cal.App.4th 943, 952 [prohibition that defendant not " 'frequent' " areas where gang activity occurs was "unconstitutionally vague, because it is both obscure and

has multiple meanings"]; *In re White* (1979) 97 Cal.App.3d 141, 147-148 [probation condition containing blanket restriction against being present in specified area of city at any time must be narrowed so that right to travel is not unduly restricted].)

Here, the challenged condition prohibits defendant from using or possessing alcoholic beverages and from "be[ing] present or frequent[ing] any location where those substances [i.e., controlled substances or alcoholic beverages] are present, available or being used." Given that alcohol is ubiquitous in our society, the condition on its face is manifestly overbroad. It would prohibit defendant, for example, from going to the home of any family member or friend if alcohol is present in the residence; shopping at any store, including grocery stores and pharmacies, that sold alcohol; going to any restaurant where alcohol is served; attending any party, including wedding receptions, graduation parties, and the like, where alcohol is served; going to public parks, beaches, or other public places where alcohol is (legally or illegally) present; and attending any sporting event where alcohol is sold or is made available (e.g., tailgate parties). As worded, the condition would significantly infringe upon defendant's constitutional rights to freedom of association and travel. (See, e.g., *People v. Nice* (2016) 247 Cal.App.4th 928, 951 [condition overly broad due to its "failure to specify scale or scope inevitably will impinge on lawful travel and movement more than otherwise required in order to enforce the purpose of the probation condition"]; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102 [probation condition prohibiting association with felons, ex-felons, or users or sellers of narcotics impermissibly infringed on right of association where it did not include language that defendant was specifically aware of person's status]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 943-945 [probation condition that defendant's place of residence be subject to approval of probation officer impermissibly infringed on defendant's constitutional right to travel and freedom of association].)

As noted, defendant contends that the no-alcohol condition should be stricken because its imposition constituted an abuse of discretion by the trial court. He asserts,

however, that the constitutional infirmity of the condition could easily be remedied by prohibiting defendant from consuming alcohol or entering places where alcohol is the chief item of sale. Since we conclude that the court did not abuse its discretion by imposing a condition relating to alcohol consumption, and since the impermissible scope of the condition as ordered may be easily remedied, we will order the no-alcohol condition modified. (*In re Sheena K. supra*, 40 Cal.4th at p. 887 [appropriate for appellate court to correct "facial constitutional defect" in probation condition].) The challenged condition will be ordered modified to read as follows: "Abstain from the use or possession of controlled substances without a valid prescription and do not be present or frequent any location where those substances are present, available or being used. Abstain from consumption of alcohol and do not visit or remain in any specific location which you know to be or which your probation officer informs you is an area where alcohol is the chief item of sale."

IV. DISPOSITION

The mandatory supervision condition recited by the court concerning alcohol and controlled substances is ordered modified to read as follows: "Abstain from the use or possession of controlled substances without a valid prescription and do not be present or frequent any location where those substances are present, available or being used. Abstain from consumption of alcohol and do not visit or remain in any specific location which you know to be or which your probation officer informs you is an area where alcohol is the chief item of sale." As so modified, the judgment of January 24, 2018 is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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